U.S. Department of Labor

Office of Administrative Law Judges
St. Tammany Courthouse Annex
428 E. Boston Street, 1st Floor
Covington, Louisiana 70433

(985) 809-5173
(985) 893-7351 (FAX)

Issue Date: 10 August 2006

Case No.: 2005-LHC-2183

OWCP No.: 06-194472

IN THE MATTER OF

P. G.,
Claimant

vs.

ALBERICI CONSTRUCTORS, INC.,

APPEARANCES:

MITCHELL G. LATTOF, SR., ESQ.,
On Behalf of the Claimant

CRAIG W. GOOLSBY, ESQ.,
On Behalf of the Employer

BEFORE: RICHARD D. MILLS
Administrative Law Judge

DECISION AND ORDER – AWARDING BENEFITS

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq., (the "Act" or "LHWCA"). The claim is brought by, P.G., "Claimant," against Alberici Constructors Inc., "Employer." Claimant seeks disability compensation and medical benefits for a hearing loss injury. A hearing was held on March 16, 2006 in Mobile, Alabama, at which time the parties were given the opportunity to offer testimony, documentary evidence, and to make oral argument. The following exhibits were received into evidence:

1) Joint Exhibit No. 1;

2) Claimant's Exhibits Nos. 1-9; and

3) Employer's Exhibits Nos. 1-6.

This decision is being rendered after giving full consideration to the entire record.[1]

STIPULATIONS

The Court finds sufficient evidence to support the following stipulations:

1) Employer received a written notification of the hearing loss from Claimant by letter, dated and mailed on August 27, 2004.

2) Employer filed a Notice of Controversion dated and mailed on November 2, 2004.

3) There was no Informal Conference.

4) The audiogram conducted by Joseph T. Holsten on August 13, 2004 evidenced a 24.1% binaural hearing loss.

5) Claimant was employed when the claim was filed.

6) Claimant's applicable average weekly wage is $874.08 with a compensation rate of $582.72.

7) No disability compensation has been paid.

8) No medical benefits have been paid.

ISSUES

The unresolved issues in these proceedings are:

1) Liability of Employer for hearing loss and medical benefits;

2) Section 14(e) Penalties;

3) Attorney's fees;

[1] The following abbreviations will be used in citations to the record: JX - Joint Exhibit, CX – Claimant's Exhibit, EX – Employer's Exhibit, and TR – Transcript of the Proceedings.

SUMMARY OF THE EVIDENCE

I. TESTIMONY

PSG

Claimant is fifty-nine years old and has a high school education. TR 9. He worked as an ironworker for thirty-eight years before retiring in 2004. TR 10. Claimant worked for Employer (as an ironworker) from February 8, 2002 until May 10, 2002. TR 10. Claimant was assigned to the Barry Steam Plant on the Mobile River in Bucks, Alabama. TR 10. The Barry Steam Plant is a large facility with five generating stations. TR 11. It has docks for water intake, docks where the barges tie off to unload coal, and about fifteen to twenty other docks further down the canal. TR 11. Claimant does not know what these other docks are used for. TR 11.

Claimant worked a number of different jobs at the Barry Steam Plant. TR 11. First, he was assigned to the No. 1 coal unloader, where a new unloader had just been installed. TR 11. This assignment involved Claimant working on the dock. TR 12. He explained that the coal comes in on barges and the unloader gets the coal out of the barge and puts it in a hopper, it then goes down to a conveyor which takes the coal either to the facility or the coal pile. TR 12. The hand railing around the dock and the new unloader was broken and Claimant's job was to repair these handrails as well as to place a new ladder from the top of the pier down to the barge on the No. 1 unloader. TR 11, 13. The new handrails were welded to the pilings on the pier. TR 25. Claimant also installed a crane that goes down into the barge and cuts the barge loose or helps to anchor it. TR 11, 13. Claimant worked this job for about four to five weeks for 10 hours a day, about six days a week. TR 11, 14. Grinders, cutting torches and welding machines were used on a daily basis as part of this job. TR 13. Claimant stated that the noise level was high during this assignment and that the workers could not talk to each other in a normal tone of voice without shutting some equipment off. TR 13. Claimant did not wear ear protection while working this job. TR 14.

On cross-examination, Claimant stated that the cutting torches don't make any particular noise. TR 25. He also stated that the welding machines were placed on the pier by trucks and were about 20 feet from where Claimant would be working. TR 26. Through the course of the day, Claimant was either running the torch or the grinder or welding. TR 27. The grinding would always take the longest. TR 27. While working this first job assignment for Employer there was noise from the portable welding machine and other noises associated with the loading and unloading of barges. TR 30. Claimant reiterated that there was loading and unloading of barges taking place while he was working on the dock. TR 30.

Claimant was next assigned to the No. 5 water intake. TR 15. The water intake site draws water out of the Mobile River to make steam for the power plant. TR 15. Claimant's job was to install a device that filtered debris and logs from the water intake system. TR 15. This assignment was completed outside on the canal. TR 16. Grinders, welding machines, cutting torches and a core drill were used during this project. TR 16. Claimant explained that this area was very noisy because it was located behind Unit No. 5 which was producing noise from the power plant in addition to noise from the tools used for the job. TR 16, 17. Claimant estimated that Unit No. 5 was about 100 feet from where he was working. TR 17. Claimant brought and wore his own hearing protection one day while working this assignment.[2] TR 17. The job took about three to four weeks to complete. TR 17. On cross-examination, Claimant testified that this water intake system did not have anything to do with the unloading of barges. TR 32.

Claimant's third assignment was to the No. 2 coal unloader. TR 17. Claimant repaired a conveyor that takes the coal from the barges when it is unloaded. TR 18. Again, grinders, welding machines and cutting torches were used on this job. TR 18. Claimant could not talk to the other workers in a normal voice while the tools were running. TR 18. Claimant did not wear any hearing protection while working this job. TR 19.

Claimant also worked inside the factory on the No. 1 coalbunker performing some repairs. TR 19. He then worked on Unit No. 5 repairing an approximately 50 foot section of the coalbunker. TR 19. The coalbunker is where the coal is stored when it is dropped from the conveyor system. TR 19. While Claimant was working inside the building, he was instructed by the "safetyman" that hearing protection was required inside the factory. TR 36. Claimant wore hearing protection during this assignment about 75% of the time. TR 20. Claimant was working as the foreman on this particular assignment and would have to take his ear plugs out on occasion to give instructions to the crew. TR 20.

Claimant did not know how long he had had a hearing loss. TR 20. He stated that he noticed it after he retired and was in a quiet environment all the time. TR 20. He would have trouble hearing the phone ring or hearing people talking to him. TR 20. Claimant testified that he had spent most of his lifetime working in noise. TR 21. In his deposition, taken prior to the hearing, Claimant testified that he had not noticed any hearing problems until several months after his job with Employer had ended. EX-6, pp. 22, 28. Claimant did acknowledge having to wear hearing protection on various other jobs with different employers prior to his job with Employer. EX-6, pp. 22.

[2] In his deposition, Claimant was asked to describe what about the job with Employer was particularly noisy. EX-6, pp. 28. He testified that while working the water intake job, one day was particularly noisy because Unit No. 5 was being brought up. EX-6, pp. 28. Claimant explained that the noise was deafening and lasted for about 10 hours. EX-6, pp. 28. On this occasion Claimant put in ear plugs. EX-6. pp. 28. Claimant stated that noise was also created by the use of grinders and air gougers. EX-6, pp. 28.

On cross-examination, Claimant stated that he had never been employed as a longshoreman in any capacity during his career. TR 21. Claimant explained that while he was working inside the Barry Steam Plant, it was on a "shut down." TR 22. This meant that various parts of the plant would be shut down, one unit at a time, while repairs were being done on it. TR 22. However, a lot of the time Claimant and the other workers would have to go into a unit while it was still running and remove equipment. TR 22.

Claimant testified that he was sure hearing protection was available at the Barry Steam Plant, although he did not see any. TR 28. Claimant also explained that hearing protection was not required unless an individual was working inside the plant. TR 29. When Claimant went inside the plant to work ear plugs were issued to him. EX-6, pp. 18. Claimant testified that he never liked wearing ear plugs because then he could not hear what was going on around him. TR 30.

Claimant retired in 2004 due to degenerating back discs. TR 37. Claimant did not deny telling Dr. Holston that Claimant's hearing problems had started about eight to ten years ago. TR 38. Claimant stated he did not notice a hearing problem that much prior to his retirement; however, he acknowledged working numerous jobs, before his job with Employer, that exposed him to loud noises. TR 39.

II. MEDICAL EVIDENCE: Audiograms and Testimony

August 13, 2004 Audiogram (CX-7)

The audiogram was administered at the University of South Alabama Speech and Hearing Clinic by Dr. Joseph T. Holsten. Claimant reported a history of decreased hearing sensitivity over the past eight to ten years. He noted difficulty hearing and understanding people. Claimant denied any exposure to loud noise in the 14-16 hour period prior to the audiogram.

The test was performed in an Industrial Acoustics Corporation Model 808A sound-treated room using a Grason-Stadler GSI-61 clinical audiometer calibrated to ANSI (1989) standards. Pure tone results indicated that Claimant had a moderate to severe sensorineural hearing loss in the mid-to-high frequency range in his right ear and mild to severe sensorineural loss in the mid-to-high frequency range in his left ear. Claimant was found to have a 22.5% hearing loss in the right ear, a 31.9% loss in the left ear and a binaural impairment of 24.1%. Based on Claimant's employment history, Dr. Holsten opined that exposure to loud noise at Claimant's workplace could have contributed to the sensorineural hearing loss present in both ears. This type of hearing loss is not a medically correctable problem, thus Claimant would be a candidate for hearing aid amplification in both ears.

Daniel E. Sellers, Ph.D. – Report of June 3, 1991 (CX-4)

Dr. Sellers is an Associate Professor of Audiology at the University of South Alabama. Dr. Sellers opined that a hearing loss injury can result from noise levels of 85 decibels or above, depending on individual tolerances, regardless of the length of time an individual is exposed. He also opined that hearing loss can occur in some persons at noise levels below 85 decibels, depending on individual tolerances.

Jim D. McDill, Ph.D. - Excerpts from Depositions of November 26, 1990 and June 21, 1991[3] (CX-5)

Dr. McDill is an audiologist certified in the state of Alabama. He testified that noise injury can occur at 85 decibels or above, but that there are individual differences such that some individuals may have an injury at less than 85 decibels. CX-5, pp. 6, 7, 9, 13. He also testified that it is possible for an individual exposed to 85 decibels or greater for less than the OSHA specified eight hours to suffer a hearing loss, dependent on the individual's tolerance for noise. CX-5, pp. 9, 15.

Alabama Power Noise Survey of Barry Steam Plant, conducted July 26 – September 16, 1971; Hearing Conservation Report for Barry Steam Plant, April 4, 1985 (CX-6)

In 1971, Alabama Power Company initiated a comprehensive noise survey of its various facilities, including the Barry Steam Plant, in order to identify the high noise areas of the plants and determine what improvements were possible for noise reduction. CX-6, p. 3. The survey revealed that sound levels in certain areas of all the plants were considerably higher than those allowed by the OSHA regulations. CX-6, p. 4. Around Units 1, 2 and 3 of the Barry Steam Plant, overall noise measurements ranged from 86-115 dB in areas where equipment was in operations. CX-6, p. 22. Unit 5 also showed noise levels throughout most of the vicinity above 90 dBA. CX-6, p. 28. However, it should be noted that Unit 5's noise measurements were taken before the unit was operating normally at full load and thus additional equipment was creating greater noise than usual. CX-6, p. 28. Unit 5's coal handling areas were specifically addressed and revealed the following noise levels: barge unloader – 70-88 dBA in the cab, beneath the coal bin – 88-90 dBA, at transfer points – 88 dBA and in the crusher house with the crusher not operating – 88 dBA. CX-6, p. 31.

[3] Depositions of Dr. McDill, taken in the cases of Arthur Dailey v. Alabama Dry Dock & Shipbuilding Co., 89-LHC-2548 and Israel Banks v. Murray Stevedoring Co., Inc., 90-LHC-2248.

In 1985, a hearing conservation report was issue for Barry Steam Plant. CX-6, p. 91. The report recommended hearing protection be required for a number of areas of operation including the plant proper, the fan-yard, the crusher house, cabs of coal handling equipment, water treatment, when operating gasoline or diesel-powered lift trucks and when spray-cleaning**,** grinding, cutting, drilling or operating air-driven power tools. CX-6, p. 91. The data collected in the report indicated that "excessive" sound pressure levels that can be expected to contribute to hearing loss exist in most areas of the plant proper except for control rooms, shacks, offices and shops. CX-6, p. 94. "Excessive" noise levels were also apparent in certain areas of water treatment, coal handling and the fan-yard. CX-6, p. 94.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon the Court's analysis of the medical records, applicable regulations, statutes, case law, and arguments of the parties. As the trier of fact, this Court may accept or reject all or any part of the evidence, including that of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. See Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). In evaluating the evidence and reaching a decision, this Court applies the principle, enunciated in Director, OWCP v. Greenwich Collieries, 114 S.Ct. 2251 (1994), that the burden of persuasion is with the proponent of the rule. The "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, will not be applied, because it violates § 556(d) of the Administrative Procedure Act. See Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 281, 114 S.Ct. 2251, 2259, 129 L.Ed. 2d 221 (1994).

JURISDICTION AND COVERAGE

In order to demonstrate coverage under the LHWCA, a worker must satisfy both a situs and status test. Herb's Welding, Inc. v. Gray, 470 U.S. 414, 415-16, 105 S.Ct. 1421, 1423, 84 L.Ed. 2d 406 (1985); P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 73, 100 S.Ct. 328, 332, 62 L.Ed. 2d 225 (1979). The situs test limits the geographic coverage of the LHWCA, while the status test is an occupational concept that focuses on the nature of the worker's activities. Bienvenu v. Texaco, Inc., 164 F.3d 901, 904 (5th Cir. 1999); P.C. Pfeiffer Co., 444 U.S. at 78, 100 S.Ct. at 334-35, 62 L.Ed. 2d 225. The situs test originates from § 3(a) of the LHWCA, 33 U.S.C. § 903(a), and the status test originates from § 2(3), 33 U.S.C. § 902(3). See P.C. Pfeiffer Co., 444 U.S. at 73-74, 100 S.Ct. at 332, 62 L.Ed. 2d 225. With respect to the situs requirement, § 3(a) states that the LHWCA provides compensation for a worker whose "disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or

building a vessel)." Id. With respect to the status requirement, § 2(3) defines an "employee" as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker…." Id. To be eligible for compensation, a person must be an employee as defined by § 2(3) who sustains an injury on the situs defined by § 3(a). Id.

In this case, Claimant worked as an ironworker at the Barry Steam Plant, which includes waterfront property on the Mobile River, a navigable waterway in Alabama. Claimant described the plant as having docks where barges pull up to unload coal. TR 11. Claimant worked for Employer for about three months and was assigned to three main jobs. First, he spent about four to five weeks working on one of the docks installing and repairing handrails on the pilings on the dock. TR 11, 13, 25. Claimant also installed a new ladder that extended from the top of the pier down to the barges and a crane that went down into the barge and either cut it loose or anchored it. TR 11, 13. Claimant next worked on the No. 5 water intake system installing a device that ran the full length of the water and filtered out logs and other debris. TR 15. Claimant's third job assignment required him to repair the conveyor system used for the transportation of coal from the barges to inside the plant. TR 18. Claimant also worked inside the factory on the No. 1 and No. 5 coalbunkers performing some repairs. TR 19.

Claimant asserts in his brief that his job working on the dock installing handrails and his job repairing the conveyor system are covered employment.[4] The Court finds that Claimant's first job assignment and third job assignment with Employer fulfill the situs requirement for coverage under the Act. While repairing and replacing the handrails on the dock, Claimant was working directly "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading or unloading of vessels.)" 33 U.S.C. § 902(3). Similarly, the conveyor system that Claimant helped repair was directly linked to the maritime activity of unloading vessels from the docks. The vessels carried the coal to the dock where it was unloaded and placed on the conveyor system to be taken to the coalbunkers for storage or to the plant for use. See generally Garmon v. Aluminum Co. of America-Mobile Works, 28 BRBS 46, 49 n.2 (1994), *aff'd on recon*., 29 BRBS 15 (1995) (the unloading process is complete when the bauxite is received for storage as it is not stored for further transshipment, but has reached its consignee and is stored to await use in the manufacturing process).

[4] Claimant has not asserted that his work repairing the coalbunkers was covered employment; therefore, the Court will not specifically address that issue as coverage is found by Claimant's other job assignments.

Employer, in its brief, points to Bianco v. Georgia Pacific, Corp., 35 BRBS 99 (2001) for support of its proposition that Claimant has not established the "situs" requirement for jurisdiction with regard to his third job assignment, repairing the conveyor system, for Employer. However, Bianco involved a claimant that was not injured while performing maritime duties; specifically, the claimant was not working on the conveyor belt while she was injured. Id. at 100, 103. Thus, the Court did not discredit the principle that a conveyor belt can be a covered situs, rather the Court found that because the claimant's injuries did not occur along the conveyor belt, but in a separate facility used solely for the manufacturing process, she was not covered. See Id. at 103. The Court noted that the administrative law judge properly found "the maritime activity of unloading the gypsum from the ships continued along employer's conveyor belt until it was received in the rock shed for storage." Id.

With respect to the status requirement, the Act prior to 1972 applied only to injuries occurring on navigable waters. Chesapeake & Ohio Ry. Co. v. Schwalb, 493 U.S. 40, 46, 110 S.Ct. 381, 385, 107 L.Ed. 2d 278, 23 BRBS 96, 98 (CRT) (1989). Longshoremen loading or unloading a ship were covered on the ship and gangplank but not shoreward, even though they were performing the same functions whether on or off the ship. Id. In 1972, Congress acted to obviate this anomaly: § 3 of the Act extended coverage to the area adjacent to the ship that is normally used for loading and unloading, but restricted the covered activity within that area to maritime employment. Id. The United States Supreme Court thereafter has held that the 1972 amendments are to be construed liberally. Id.

The Supreme Court indicated in Schwalb that coverage under the LHWCA "is not limited to employees who are denominated 'longshoremen' or who physically handle the cargo." 493 U.S. at 47, 110 S.Ct. at 385, 107 L.Ed. 2d 278, 23 BRBS at 99 (CRT); Buck v. General Dynamics Corp., 37 BRBS 53, 55 (2003). Instead, the status requirement as applied to land-based work, other than longshoring and the other occupations named in § 2(3) of the Act, is an occupational test focusing on the loading, unloading, building, and repairing of a vessel. Schwalb, 493 U.S. at 45-46, 23 BRBS at 98 (CRT); Herb's Welding, Inc., 470 U.S. at 424, 105 S.Ct at 1427-28, 84 L.Ed. 2d 406; Buck, 37 BRBS at 55. That is, land-based occupations, other than the occupations specified in § 2(3), will be covered under the LHWCA only if the occupation is an integral or essential part of loading, unloading, building, or repairing a vessel. Schwalb, 493 U.S. at 45-47, 23 BRBS at 99 (CRT); Buck, 37 BRBS at 55. The determinative consideration in identifying whether an occupation is integral or essential is whether the employee's role is such that the loading, unloading, building, or repairing process could not continue absent the employee's position. See Buck, 37 BRBS at 55-58; Sidwell, 372 F.3d at 242.

Claimant was an ironworker for Employer. He repaired and installed handrails and ladders and installed a crane on the docks where vessels loaded and unloaded cargo. He also repaired the conveyor system that was used to transport the cargo from the docks to either the plant for use or to the storage facilities. The Court finds that Claimant's work was land-based and, therefore, must be integral or essential to the loading, unloading, building, or repairing of a vessel in order to confer § 2(3) coverage. See Schwalb, 493 U.S. at 45-47, 23 BRBS at 99 (CRT). Installing and repairing handrails and ladders on the dock where coal is unloaded from vessels is essential to the loading and unloading of the vessel as these rails are a part of the dock and aid in the loading and unloading process. Claimant also installed a crane that goes down into the barge and cuts the barge loose or helps to anchor it, thus being an essential part of the loading and unloading of the vessels. The conveyor system that Claimant repaired is another integral facet of the unloading process, as coal is taken from the vessel and placed on the conveyors to be transported to the plant or to the coalbunkers for storage. Without these conveyor systems in working order the unloading of the vessels at the Barry Steam Plant would obviously be hindered.[5] See P.C. Pfeiffer Co., 444 U.S. at 82-83, 100 S.Ct. at 337, 62 L.Ed. 2d 225 (persons engaged in some portion of process of moving cargo between ship and land are engaged in maritime employment). The Court finds that Claimant's work passes the occupational test set forth by the Supreme Court for land-based work.

An additional condition of the status requirement is that the claimant must "spend at least some of [his] time in indisputably longshoring operations." Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 273, 97 S.Ct.2348, 53 L.Ed.2d 320, 6 BRBS 150, 165 (1977). Although an employee is covered if some portion of his activities constitutes covered employment, those activities must be more than episodic, momentary or incidental to non-maritime work. Boudlouche v. Howard Trucking Co., 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), cert. denied, 452 U.S. 915 (1981); Coleman v. Atlantic Container Service, Inc., 22 BRBS 309 (1989), aff'd, 904 F.2d 611, 23 BRBS 101 (CRT) (11th Cir. 1990). An "episodic" activity is one which is "discretionary or extraordinary"

[5] As Claimant asserts, the instant case is similar to Jones v. Aluminum Co. of America, 31 BRBS 130 (1997). In Jones, the Board held that "… although the primary purpose of the employer's facility was to process alumina, the work at issue involves maintenance of the conveyors which transported bauxite from the ships to employer's storage facility for later use in the manufacturing process. Thus, the conveyor did not move stored cargo, but instead moved shipped cargo that was still in the unloading process. See Prolerized New England Co. v. Miller, 691 F.2d 45, 15 BRBS 23 (CRT) (1st Cir. 1982) (worker who maintains conveyor belt and "stacker" which are integral to loading the product onto ships is covered)." Id. Similarly, Claimant testified that coal was unloaded from the barges, put on hoppers, then put on the conveyor system and transported either to the plant for use or to coalbunkers for storage. TR 31. Thus, the Court finds that Claimant's work on the conveyor system was an integral part of the loading and unloading process and constitutes covered employment.

as opposed to one which is "a regular portion of the overall tasks to which a claimant may be assigned. . . ." Jones v. Aluminum Co. of America, 31 BRBS 130 (1997) (quoting Levins v. Benefits Review Board, 724 F.2d 4, 16 BRBS 24 (CRT) (1st Cir. 1984)); see also McGoey v. Chiquita Brands Int'l, 30 BRBS 237 (1997).

The Court finds that a sufficient portion of Claimant's activities constituted covered employment. Claimant testified that he worked between four to five weeks repairing and installing handrails on the dock for the No. 1 unloader. This comprises approximately one-third of Claimant's employment with Employer. While this job assignment alone would be sufficient to convey maritime status on Claimant, Claimant also worked for a period of time repairing the conveyor system that transported coal from the vessels to the storage bins. The Board has found much smaller time periods sufficient to satisfy the status requirement when the work activity was a regularly assigned land-based longshoring task. See Lewis v. Sunnen Crane Service, Inc., 31 BRBS 34 (1997) (finding one to two percent of time spent in ship repair or cargo handling was sufficient to establish the claimant's maritime status; Jones v. Aluminum Co. of America, 31 BRBS 130 (1997) (holding that one percent of time spent in repairing conveyer belts used in the unloading process was sufficient to establish covered employment). There is no evidence that Claimant's work repairing and replacing handrails on the dock was discretionary, but rather it was a specific job for which Claimant was assigned by Employer. See Id. Claimant has satisfied the occupational test for land-based work and spent at least "some" of his time in longshoring operations; therefore, status coverage does exist for Claimant under the Act.

Based on the foregoing, the Court finds that Claimant has satisfied both the situs and status tests. Therefore, jurisdiction under the Act is proper for this case.

FACT OF INJURY AND CAUSATION

The claimant has the burden of establishing a *prima facie* case of compensability. He must demonstrate that he sustained a physical and/or mental harm and prove that working conditions existed, or an accident occurred, which could have caused the harm. Graham v. Newport News Shipbuilding & Dry Dock Co., 13 BRBS 336, 338 (1981); U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, 616, 102 S.Ct. 1312, 1318, 71 L.Ed. 2d 495 (1982). Once the claimant establishes these two elements of his *prima facie* case, § 20(a) of the Act provides him with a presumption that links the harm suffered with the claimant's employment. See Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981); Hampton v. Bethlehem Steel Corp., 24 BRBS 141, 143 (1990). When an employee sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside of work, the employer is liable

for the entire disability and for medical expenses during both injuries if the subsequent injury is the natural and unavoidable result of the original work injury. See Atlantic Marine v. Bruce, 661 F.2d 898, 901, 14 BRBS 63, 65 (5th Cir. 1981); Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454, 456-57 (9th Cir. 1954); Mijangos v. Avondale Shipyards, 19 BRBS 15, 17 (1986).

In this case, Claimant asserts that he is covered under the Act for exposure to injurious levels of noise during two job assignments: while working on the Barry Steam Plant's dock repairing and installing handrails and while working on the plant's conveyor system. TR 13. While installing and repairing the handrails, Claimant stated that he could not talk to the other workers in a normal tone of voice; they would have to shut off some of their equipment in order to hear each other. TR 13. Grinders, cutting torches, welding machines and other equipment were used during the assignment. TR 13, 14. Also, Claimant testified on cross-examination that other noise associated with the loading an unloading of the barges was going on while Claimant was working on the dock. TR 30. Similarly, while repairing the conveyor system, Claimant stated he was exposed to high levels of noise. TR 18. He could not talk to the other workers in a normal tone of voice while the grinders and welding machines were running. TR 18.

In Addition to Claimant's testimony regarding the noise levels during these different assignments, he proffered Dr. Joseph T. Holsten's 2004 audiogram, reflecting a 24.1 percent binaural hearing impairment, to establish that he suffered an injury. CX-6. Claimant also offered a report by professor of audiology, Dr. Sellers', CX-4, and testimony from audiologist Dr. McDill, CX-5, both of whom opined that noise injury can occur at 85 decibels or above and sometimes, depending on the individual tolerances, at lower decibels. Noise injury can also result from exposure for short periods of time, depending on an individual's tolerance for noise. CX-4, CX-5.

Claimant submitted evidence regarding the noise levels at the Barry Steam Plant. CX-6. Claimant asserts in his brief that covered exposure occurred during his assignment repairing and installing handrails and during his assignment to repair the conveyor system. Although it is not clear from the record whether the survey covers the specific outside areas where Claimant was working during his covered employment, it does provide persuasive evidence that noise levels in and around the plant were at potentially injurious levels. The survey revealed that sound levels in certain areas of all the plants were considerably higher than those allowed by the OSHA regulations. CX-6, p. 4. Around Units 1, 2 and 3 of the Barry Steam Plant, overall noise measurements ranged from 86-115 dB in areas where equipment was in operations. CX-6, p. 22. Data collected in a 1985 hearing conservation report indicated that "excessive" sound pressure levels that can be expected to contribute to hearing loss exist in most areas of the plant proper except for control rooms, shacks, offices and shops. CX-6, p. 94. "Excessive" noise levels were also apparent in certain areas of water treatment, coal-handling and the fan-yard. CX-6, p. 94. The report recommended hearing protection be required for a

number of areas of operation including the plant proper, the fan-yard, the crusher house, cabs of coal handling equipment, water treatment, when operating gasoline or diesel-powered lift trucks and when spray-cleaning, **grinding, cutting, drilling or operating air-driven power tools.** CX-6, p. 91.

The Court finds that Claimant has presented evidence sufficient to demonstrate that he sustained a physical harm and that working conditions existed, which could have caused the harm. Accordingly, Claimant has made a *prima facie* case of compensability and is entitled to the § 20(a) presumption.

After the § 20(a) presumption has been established, the employer must introduce "substantial evidence" to rebut the presumption of compensability and show that the claim is not one "arising out of or in the course of employment." 33 U.S.C. §§ 902(2), 903. Only after the employer offers substantial evidence does the presumption disappear. Del Vecchio v. Bowers, 296 U.S. 280, 286, 56 S.Ct. 190, 193 (1935). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept to support a conclusion. Sprague v. Director, OWCP, 688 F.2d 862, 865 (1st Cir. 1982). In a case involving an independent intervening injury, an employer must show that the claimant's condition was caused by a subsequent event not connected to the work-related injury. Plappert v. Marine Corps Exchange, 31 BRBS 13, aff'd on recon. en banc, 31 BRBS 109 (1997); Bass v. Broadway Maintenance, 28 BRBS 11 (1994); James v. Pate Stevedoring Co., 22 BRBS 271 (1989). If the employer meets its burden, the presumption disappears, and the issue of causation must be resolved based upon the evidence as a whole. Kier v. Bethlehem Steel Corp. 16 BRBS 128, 129 (1984); Devine v. Atlantic Container Lines, G.I.E., 25 BRBS 15, 21 (1991).

Employer asserts that Claimant was not exposed to injurious levels of noise during his covered employment. However, Employer does not present any substantial evidence to support its contention. Therefore, the Court finds that Employer has not rebutted the § 20(a) presumption and that Claimant has established causation.

NATURE AND EXTENT OF DISABILITY

Under the Act, Section 8(c)(13) and its accompanying regulations govern hearing loss claims. 33 U.S.C. §908(c)(13); 20 C.F.R. § 702.441. An audiogram is considered presumptive evidence of the extent of a claimant's hearing loss sustained as of the date thereof if: (i) the audiogram was administered by a licensed or certified audiologist or a physician who is certified in otolaryngology, (ii) the audiogram, with the report thereon, was provided to the employee within 30 days of its administration, (iii) no contrary audiogram is made within 30 days of the subject audiogram where a claimant continues

to be exposed to excessive noise levels or within 6 months if such exposure ceases, (iv) the audiometer is calibrated according to current American National Standard Specifications; and (v) the extent of hearing loss is measured according to the most currently revised edition of the American Medical Association Guides. 33 U.S.C. §908(c)(13); 20 C.F.R. § 702.441(b) and (d).

The Court finds that the audiogram conducted by Dr. Joseph T. Holsten on August 13, 2004 complies with the above referenced standards and is credible evidence of the nature and extent of Claimant's hearing loss. Employer has presented no rebuttal evidence. Thus, Claimant is found to have a binaural hearing impairment of 24.1% attributable to his employment with Employer. Compensation payments for a hearing loss begin on the date of the claimant's last exposure to injurious industrial noise. Bath Iron Works Corp. v. Director, OWCP, 506 U.S. 153, 165 (1993); Moore v. Ingalls Shipbuilding, Inc., 27 BRBS 76, 79 (1993). Claimant testified that he last worked for Employer on May 10, 2002. TR 10.

REASONABLE AND NECESSARY MEDICAL EXPENSES

Section 7(a) of the Act provides that:

> (a) the employer shall furnish such medical, surgical, and other attendance or treatment, nurse or hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process or recovery may require. 33 U.S.C. § 907(a).

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-58 (1984). The claimant must establish that the medical expenses are related to the compensable injury. See Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); see also Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. See Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), aff'g 12 BRBS 65 (1980). An employee cannot receive reimbursement for medical expenses unless he has first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; see also Shahady v. Atlas Tile & Marble Co., 682 F.2d 968 (D.C. Cir. 1982)(per curiam), rev'g 13 BRBS 1007 (1981), cert. denied, 459 U.S. 1146 (1983); McQuillen v. Horne Brothers Inc., 16 BRBS 10 (1983); Jackson v. Ingalls Shipbuilding, 15 BRBS 299 (1983). Claims for

medical benefits do not prescribe, so the claimant may file a claim for medical benefits as medical treatment becomes necessary. Colburn v. General Dynamics Corp., 21 BRBS 219, 222 (1988); Strachan Shipping Co. v. Hollis, 460 F.2d 1108 (5th Cir.), cert. denied, 409 U.S. 887 (1972).

In the instant case, Dr. Holston indicated that Claimant is a candidate for hearing aid amplification in both ears. RX-7. The Court finds that Employer is liable for Claimant's medical treatment arising out of his hearing loss.

§ 14(E) ASSESSMENT

Section 14(e) provides that if employer fails to pay compensation voluntarily within 14 days after it becomes due, as set out in Section 14(b), employer shall be liable for an additional 10 percent added to unpaid installments. This procedure operates unless employer filed a timely notice of controversion, as provided in Section 14(d), or unless the deputy commissioner excuses the failure to pay compensation voluntarily upon a showing by employer that, because of conditions beyond its control, it could not make timely payments. 33 U.S.C. § 914(e). In this case, Employer received notice of Claimant's injury via letter, dated and mailed on August 27, 2004. JX-1. Employer has not paid any disability benefits and did not file a Notice of Controversion until November 2, 2004. JX-1. Therefore, the Court finds that Claimant is entitled to the § 14(e) assessment.

ATTORNEY'S FEES

Under Section 28(a) of the Act, when an employer declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation and the claimant utilizes the services of an attorney at law in the successful prosecution of the claim, the employer will be liable for a reasonable attorney's fee. 33 U.S.C. § 928(a). In this case, Employer did not pay Claimant any disability benefits. JX-1. Because the Court has awarded Claimant compensation, the Court finds that Claimant is entitled to attorney's fees from Employer pursuant to Section 28(a) of the Act.

Accordingly,

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

1) Employer shall pay to Claimant compensation in accordance with Section 8(c)(13) of the Act for a 24.1% binaural hearing loss, based on an average weekly wage of $874.08.

2) Employer shall pay Claimant for all reasonable and necessary future medical expenses that are the result of Claimant's employment-related hearing loss as provided by Section 7 of the Act.

3) Employer shall pay to Claimant interest on any unpaid compensation benefits. The rate shall be calculated as of the date of this Order at the rate provided by 28 U.S.C. Section 1961.

4) Employer shall pay to Claimant an additional 10 percent on unpaid installments of compensation as provided by 33 U.S.C. Section 914(e).

5) Claimant's counsel shall have thirty (30) days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have twenty (20) days from receipt of the fee petition in which to file a response.

6) All calculations necessary for payment of this award are to be made by the OWCP District Director.

So ORDERED.

A

RICHARD D. MILLS
Administrative Law Judge